

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARLOS J. ROGERS
Claimant

VS.

GOODYEAR TIRE & RUBBER COMPANY
Self-Insured Respondent

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Docket No. 1,062,258

ORDER

Claimant requests review of the March 6, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Patrick M. Salsbury, of Topeka, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board adopts the stipulations and has considered the same record as did the ALJ, consisting of the Discovery Deposition of Carlos J. Rogers, taken on January 8, 2013; the transcript of Preliminary Hearing, taken on March 5, 2013, with exhibits; and the documents filed of record with the Division.

ISSUES

The ALJ denied claimant's preliminary hearing requests after finding claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent. The ALJ found and concluded that the prevailing factor in claimant's current condition was not the June 22, 2012, work accident, but rather claimant's prior left knee injury and the degenerative changes in the knee.

Claimant requests review of whether the ALJ was correct that there was a preexisting tear from an old August 8, 2002, injury, and whether the fact finder ignored uncontroverted/uncontradicted evidence that was otherwise trustworthy and reliable. Claimant argues the ALJ's Order should be reversed and the claim should be compensable.

Respondent argues the ALJ's Order should be affirmed in its entirety, as claimant has failed to sustain his burden that his current condition in his left knee is anything other than what it was in 2003, and represents an aggravation of his preexisting symptoms.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant began working for respondent on June 8, 1998, and continues to work for respondent, as a set-up technician. His job is to work on the machines and keep them running. As a result of his job, claimant sometimes gets oil on his shoes.

Claimant has a history of left knee problems stemming from a work-related accident on August 6, 2002, when he hit his left knee on a tire wagon and fell. Claimant broke the middle finger on his left hand and landed on his left knee. Claimant was referred to St. Francis Hospital emergency room for initial treatment. He was returned to work with restrictions of no lifting over 35 pounds with his left hand. Claimant's left hand appears to have healed with no permanent problems. However, his complaints associated with the left knee persisted.

An MRI of the left knee performed on August 9, 2002, indicated a moderate joint effusion and fluid anterior to the ACL. The lateral meniscus was read as normal with some hyper intensity in the posterior horn of the medial meniscus consistent with Grade I-II degeneration, but there was no confirmation of a clinical tear. Both the medial and lateral collateral ligaments were normal. There was mild to moderate patellar cartilage loss. X-rays of the knee displayed a small joint effusion.

An examination on August 15, 2002, with Thomas McLean, M.D., noted the favorable MRI report. By August 22, 2002, claimant was reporting improvement in the left knee. The September 16, 2002, office note indicated minimal symptoms, increasing with claimant working overtime. On October 28, 2002, claimant reported that climbing stairs aggravates his knee condition. Concern was raised regarding the possibility of the development of a degenerative condition in claimant's left knee. Negotiating stairs continued to be a problem associated with a loss of cartilage on the patellar surface of the knee. Claimant made some modifications at work in order to avoid climbing stairs. Claimant was cautioned that the degenerative condition would get worse with time. On January 22, 2003, claimant reported that his left knee would give out on him causing him to fall. He had a noticeable limp at that time. Claimant continued performing his regular job during this treatment period.

On April 7, 2003, claimant reported pain in the knee, worse with extended periods of walking. A referral to an orthopedic surgeon was recommended. On April 16, 2003, claimant was examined by orthopedic surgeon, John H. Gilbert, M.D. Claimant's left knee

contained mild patellofemoral crepitus with mild degenerative changes on x-ray, and mild joint space narrowing in the medial joint compartment. Dr. Gilbert read the August 9, 2002, MRI as showing early degenerative changes in the posterior horn of the medial meniscus and significant patellofemoral degenerative disease. The May 20, 2003, report from Dr. Gilbert identified osteoarthritis in the left knee, with an acute sprain and a torn medial meniscus. A referral to either Dr. Lepse or Dr. Wallace was recommended. Claimant continued performing his regular job with respondent.

On July 15, 2003, claimant was examined by board certified orthopedic surgeon, Brett E. Wallace, M.D. Claimant was diagnosed with patellofemoral arthritis but no clear evidence of meniscal degeneration or tear. Surgery was not recommended and claimant was released. This July 15, 2003, medical report is the last medical report regarding claimant's left knee in this record, until after the June 22, 2012, accident.

Claimant testified that on June 22, 2012, he slipped on some oil with his right leg. When he caught himself with his left leg, he heard a pop in his left knee and felt burning pain. Claimant reported the accident and was sent to the dispensary. Claimant received conservative treatment including ibuprofen, ice and a wrap for the knee. Claimant was allowed to return to work. He was never taken off work or given light duty.

Claimant complains that his left knee swells sometimes and burns when he goes up and down stairs. His knee really hurts when he has to work on his hands and knees. He has swelling in his knee about three times a week and applies ice every day at home. Claimant's swelling and burning is on the right side and lower part of his left knee. Claimant received ibuprofen from the dispensary and takes Tylenol at home. Claimant denied ever having problems with his left knee before this accident, although he admitted to problems with his left knee in 2002. Claimant testified that when Dr. Wallace released him, his left knee was fine and it continued to be fine until the June 22, 2012, accident.

Claimant did not go through the appeal process for his 2002 left knee injury, because, although he was provided treatment, everything went through the dispensary at Goodyear. He was released for this injury on July 15, 2003, and was advised to avoid or use caution when doing certain activities such as squatting or using stairs. Claimant seems to be confused about when and if he had any left knee problems prior to June 22, 2012.¹

Claimant continues to work for respondent, and continues to have swelling in his left knee from the 2012 injury. Claimant testified that after the 2002 accident, no one told him he had a torn meniscus and he doesn't recall discussions about possible degenerative changes in his left knee at that time.

¹ P.H. Trans. at 18.

Claimant met with board certified orthopedic surgeon, Edward J. Prostic, M.D., for an examination, on October 22, 2012. Claimant had complaints of frequent pain on the medial side of his left knee, stiffness when he wakes up, difficulty initiating walking and difficulty with progressive standing or walking, going up and down stairs, squatting, or kneeling. He is unable to run or jump and continues with swelling and his knee giving way.

Dr. Prostic opined claimant injured his left knee in the course of his employment on June 22, 2012. He estimated the injury appeared to be a tearing of the medial meniscus of the knee. Dr. Prostic recommended claimant undergo an MRI, and, should a lesion be confirmed, arthroscopic debridement should be offered. Dr. Prostic opined that the June 22, 2012, accident was the prevailing factor in causing claimant's left knee injury and the current need for treatment.²

In a letter dated March 4, 2013, Dr. Prostic discussed his review of claimant's medical records from 2002. After reviewing the records, it remained his opinion that the prevailing factor of claimant's post June 22, 2012, need for medical treatment in his left knee was his June 22, 2012, injury while claimant worked for respondent.³

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

² P.H. Trans., Cl. Ex. 1 at 2.

³ P.H. Trans., Cl. Ex. 2.

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B)(3) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The ALJ found the prevailing factor leading to claimant's current need for left knee treatment to be the 2002 accident. She rejected Dr. Prostic's opinion that the 2012 accident was the prevailing factor at this time. However, her opinion does not explain claimant's ability to work his regular job, although with some self accommodation, for nine years without the need for medical treatment. Not until claimant suffered a specific and traumatic accident, resulting in immediate symptoms, did claimant seek the recent medical treatment for his left knee. This Board Member finds claimant's current need for medical treatment stems from the accident and resulting injury on June 22, 2012, with that accident being the prevailing factor causing the injury, medical condition and need for medical treatment. The Order of the ALJ, denying claimant medical treatment for his left knee is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving the accident on June 22, 2012, is the prevailing factor causing his current left knee injury and the current need for medical treatment for that medical condition. The Order of the ALJ denying medical care for claimant's left knee is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated March 6, 2013, is reversed.

⁴ K.S.A. 2011 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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